Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT PADGET, WILLIAM CAIN, JR., KEITH MCGEE, TERRY NORRIS, ROBERT SOLOMON, MIKE WINEMILLER, LARRY SNELLENBERGER,

Petitioners,

v.

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION and GRAPHIC COMMUNICATIONS UNION LOCAL 303,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF GRAPHIC COMMUNICATIONS INTERNATIONAL UNION AND GRAPHIC COMMUNICATIONS UNION LOCAL 303 IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the six month limitations period contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b), rather than the two year Indiana legal malpractice limitations period, I.C. 34-1-2-2(1), applied to an action in which Plaintiffs-Petitioners allege that Defendant-Respondent Unions violated the duty of fair representation by failing to perform all prerequisites to a work stoppage, thus allegedly resulting in Plaintiffs' loss of employment.

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OPINIONS BELOW

The opinion of the court of appeals is reported *sub nom. Johnson, et al., v. Graphic Communications International Union and Graphic Communications Union Local 303* at 930 F.2d 1178 (7th Cir. 1991). Pet. App. A1-A10. The district court's opinion is unreported. Pet. App. A11-A19.

STATEMENT OF THE CASE

Petitioners Robert Padget, William Cain, Jr., Keith McGee, Terry Norris, Robert Solomon, Mike Winemiller and Larry Snellenberger (hereinafter "Petitioners" or

"Plaintiffs") are present and former employees of Moore-Langen Printing Company of Terre Haute, Indiana. Pet. App. A20-A21, Par. 1. In November of 1983, the collective bargaining agreement between Plaintiffs' employer, Moore-Langen Printing Company, and Respondent-Defendant Local 303 had expired, and when negotiations for a new collective bargaining agreement failed to produce a new agreement, the Union called its members out on strike in April 1984. Pet. App. A21, Pars. 4 and 5. Plaintiffs' duty of fair representation claim is based on their factual allegation that Respondents-Defendants Graphic Communications International Union and its Local 303M (hereinafter jointly referred to as "the Union") convinced them to strike and advised them that all statutorily required notices had been given prior to the commencement of the strike. Pet. App. A21, Par. 6. Petitioners contend that in reliance upon the Union's representations, they commenced striking on April 16, 1984. Pet. App. A21, Par. 7. As a consequence of the Union's failure, the strike in which Plaintiffs engaged was declared unprotected and Plaintiffs' employment at Moore-Langen Printing Company was terminated, with recourse to the National Labor Relations Board precluded. Pet. App. A22, Pars. 8 and 9.

Plaintiffs' Complaint alleged that the act of the Union which gave rise to their cause of action occurred on April 15, 1984. Pet. App. A21, Par. 6. Plaintiffs did not file their Complaint with the district court until April 15, 1986 (Pet. App. A13), prompting the Union to move for dismissal of the action as time-barred by their failure to comply with the six (6) month statute of limitations imposed on duty of fair representation cases pursuant to Section 10(b) of the Labor-Management Relations Act, 29 U.S.C. Sec. 160(b), and this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983). The district court denied the Union's motion to dismiss, finding that Plaintiffs' claim was not a hybrid duty of fair representation/breach of contract claim such as that in *DelCostello*

and that its holding therefore did not apply to Plaintiffs' claim. The court then concluded that "[s]ince the state-law malpractice action is the most closely analogous to the instant action" (Pet. App. A18), the applicable limitations period was two years (Indiana Code 34-1-2-2(1)), making Plaintiffs' action timely.

The Union subsequently sought and obtained permission to bring an interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b). In an opinion issued April 19, 1991, the Court of Appeals for the Seventh Circuit reversed the district court and remanded the case with instructions to dismiss the action as untimely. In reaching this result, the court noted that in *DelCostello*, this Court had sanctioned departure from the "norm" of borrowing state limitations periods " 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate rule for interstitial law making . . . .' 462 U.S. at 172." Pet. App. A5. Finding that Plaintiffs' claim for breach of the duty of fair representation was "not just closely analogous, but identical" to an unfair labor practice claim for breach of the duty of fair representation (Pet. App. A6), the court of appeals concluded that "when 'we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here . . . ,' [*DelCostello*, 462 U.S. at 169], the federal statute is more fitting than an approximation drawn from state law." Pet. App. A10.

REASONS THE WRIT SHOULD BE DENIED

1. In *DelCostello*, this Court held that the appropriate statute of limitations in hybrid Section 301/duty of fair representation cases is the six month period for unfair labor practice charges prescribed in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b).

This case presents the issue of whether the Supreme Court's holding in *DelCostello* is properly applied to an action in which the Plaintiffs allege that the Union violated the duty of fair representation by failing to perform all prerequisites to a work stoppage, thus allegedly resulting in Plaintiffs' loss of employment. The court of appeals' conclusion that a federal limitations period should be applied anticipated [1] this Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 59 U.S.L.W. 4688 (U.S. June 20, 1991) (90-333),[2] *and is indisputably correct* under *Gilbertson's* holding that

> . . . where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections. See *DelCostello*, 462 U.S., at 171; *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 69-70 (1981) (opinion concurring in judgment). *When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end.* Only where no analogous counterpart is available should a court then proceed to apply state-borrowing principles.

Gilbertson, 59 U.S.L.W. at 4690 (emphasis supplied).

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[1] In ruling for the Union, the Seventh Circuit relied substantially on its earlier decision in *Short v. Belleville Shoe*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3865 (U.S. June 28, 1991) (No. 90-526), in which the court had held that a federal limitations period applied to suits arising under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. In *Gilbertson*, this Court specifically noted its agreement with the Seventh Circuit's decision in *Belleville Shoe*. 59 U.S.L.W. at 4691.

[2] Plaintiffs' petition for certiorari does not discuss this Court's decision in *Gilbertson*.

"The analytical framework [adopted in *Gilbertson*] makes consideration of state law alternatives unnecessary where Congress has provided an express limitations period for correlative remedies within the same enactment." *Gilbertson*, 59 U.S.L.W. at 4691. Here, Plaintiffs' implied cause of action under Section 301 of the Labor Management Relations Act of 1947 (which amended the National Labor Relations Act of 1935) is certainly "correlative," if not identical to, an unfair labor practice charge under Section 8(b)(1)(A) of the National Labor Relations Act.[3] As this Court noted in *DelCostello*:

> In this case, however, we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—*a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state law parallels. We refer to Section 10(b)* of the National Labor Relations Act. . . .
>
> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices [citations omitted]. We have twice declined to decide the correctness of the Board's position, and we need not address that question today. Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is substantial overlap.

462 U.S. at 169-170 (emphasis supplied).

2. Even before this Court's recent decision in *Gilbertson*, the lower courts had virtually uniformly[4] concluded

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[3] The court of appeals noted that Plaintiffs here had filed a charge under Section 8(b)(1)(A) of the National Labor Relations Act which raised claims identical to those in this law suit: "[a]lthough the failed unfair labor practice charge was dressed up for purposes of the federal suit, the conduct complained of was the same." Pet. App. A7. Plaintiffs filed this suit more than a year and a half after the National Labor Relations Board dismissed their charge. *Id.*

[4] In *Brenner v. Local 514, Carpenters*, 927 F.2d 1283 (3d Cir. 1991), for reasons similar to those of the district court in this case,

that *DelCostello* should apply to non-hybrid duty of fair representation claims. Thus, for example, in *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir. 1984), *cert. denied*, 467 U.S. 1243 (1984), the Eleventh Circuit held that the Section 10(b) limitations period governed a union member's class action alleging that a union breached its duty of fair representation when its officers committed various acts of misconduct during an extended strike against their employer. Similarly, in *Richardson v. United Steelworkers*, 864 F.2d 1162 (5th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3013 (U.S. May 21, 1990) (No. 88-2009), the Fifth Circuit held that the Section 10(b) limitations period applies to a suit against the union alone for allegedly breaching the union's duty of fair representation by failing to advise striking employees of the employer's right to permanently replace them. *See also Coyle v. BRAC*, 838 F.2d 1404 (5th Cir. 1988) (applying Section 10(b) limitations period to a railroad employee's action against his union alone alleging that the union violated both the Railway Labor Act and the shop agreement by causing him to be discharged for non-payment of dues pursuant to the shop agreement); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989) (citing *Richardson* and holding that the six month limitations period set forth in Section 10(b) applied to an employee's claim for breach of the duty of fair representation against his union for having irresponsibly informed him that he would receive early retire-

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the United States Court of Appeals for the Third Circuit concluded that a state limitations period controlled a duty of fair representation suit which alleged that a union had engaged in discriminatory hiring hall practices. The plaintiffs in that suit contended that either Pennsylvania's two year limitations period for fraud and other personal injury actions or its four year limitations period for most breach of contract actions applied to their claim, and the court of appeals remanded the case for a determination of which state limitations period should apply. The Union knows of no other case in which a federal court has refused to apply *DelCostello* to a duty of fair representation claim, and, presumably, the Third Circuit will overrule its decision in *Brenner* in light of *Gilbertson*.

ment benefits if he took separation pay); and *Eatz v. IBEW DME Unit Local 3*, 794 F.2d 29 (2d Cir. 1986) (applying *DelCostello* to an action against a union alone under Section 301 which alleged that the union, in concert with the employer, had unfairly discriminated against the plaintiff employees during the negotiation and administration of several collective bargaining agreements).

The law being essentially settled, with any ambiguity now resolved by this Court's decision in *Gilbertson*, the issue presented in this case does not merit review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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